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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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No. _____

ROBERT THOMAS LARSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

---

# PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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## QUESTION PRESENTED

Is it a violation of the due process clause of the Fifth and Fourteenth Amendments to the United

States Constitution for the prosecutor to try Petitioner a fourth time after three "hung jury" mistrials.

## LIST OF PARTIES

The parties to the proceedings below were the petitioner Robert Thomas Larson and the respondent the State of California.

The respondent before this Court is the State of California.

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## OPINIONS BELOW

The unofficial reports of the opinions below are contained in the appendix as follows:

1. Opinion of the Court of Appeal of the State of California, Second

Appellate District, Division Six, filed May 2, 1991, attached hereto as Appendix A;

2. Order of the Supreme Court of the State of California In Bank, extending time for review, filed July 12, 1991, attached hereto as Appendix B;

3. Order of the Supreme Court of the State of California In Bank, denying review, filed August 14, 1991, attached hereto as Appendix C.

## JURISDICTION

The constitutional question of the violation of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution was raised before and after judgment in the fourth trial. The same issue was raised before the Court of Appeal by way of appeal and Petition for Rehearing. It was raised before the California Supreme Court by way of Petition for Review.

Specifically, counsel for the Defendant raised this issue after the third trial by way of a Motion to Dismiss filed on March 31, 1989, and denied in open court on April 24, 1989.

Petitioner then filed a Petition for Writ of Mandate asserting a denial of due process under the Federal Constitution in the Court of Appeal of the State of California, Second Appellate District,

Division 6, which was denied by order dated July 10, 1989.

Petitioner then petitioned for review asserting a denial of due process under the Federal Constitution before the Supreme Court of the State of California. The Petition was denied, with one dissenting vote, by order entered August 17, 1989.

The matter was then set for trial August 21, 1989; Petitioner appeared at that time and requested a stay of the trial to permit the filing of a Petition for Writ of Certiorari in the United States Supreme Court;

This issue was again raised before judgment in the fourth trial by way of a Motion to Dismiss on the ground that Defendant was denied his rights to due process under the State and Federal Constitutions which was denied on April

24, 1989.

On October 4, 1989, present counsel filed a pleading entitled Notice of Intention to Move for a New Trial and Memorandum of Points and Authorities. Therein counsel for Defendant argued that Defendant had been denied due process under both the United States Constitution and the California Constitution by being tried for a fourth time. The Motion for New Trial which was denied on November 7, 1989.

On appeal, the Defendant raised that "more than two trials violates the federal and state constitutional guarantees of due process and fundamental fairness unless there are extraordinary circumstances" in the Appellant's Opening Brief filed on August 7, 1990.

On June 12, 1990, counsel for Defendant filed a Petition for Review in

front of the Supreme Court of the State of California arguing that allowing the case to be tried for an unprecedented fourth time after three "hung jury" mistrials is a denial of due process of law.

It is respectfully submitted that the federal question presented here was timely and properly raised so as to give this Court jurisdiction to review the judgment on Writ of Certiorari.

Title 28 of the United States Code, Section 1257 and Rule 17 of the Supreme Court Rules confers jurisdiction on the Court.

## STATEMENT OF THE CASE

This case arose from an automobile accident which took place in California on August 9, 1987 on Highway 101.

ROBERT THOMAS LARSON was driving his Ford Econoline van along Highway 101 Southbound through San Luis Obispo when he noticed a motorhome ahead of him. He gradually came up upon it. The motorhome was traveling just a bit slower than he was and he decided to change lanes to go past it. He did not pay any attention to the motorhome after he changed lanes and gave it plenty of room. A few minutes later, Mr. Larson heard a bang, went left into the ice plant and then into the Northbound lanes where he hit his brakes. The whole incident took only a few seconds.

In the Northbound lanes, Mr. Larson's vehicle collided with a blue

Chevy Citation occupied by John Walker, Michael Murray and Alan Vandermyden.

Mr. Larson was stunned by the impact. Although severely injured, he undid his seatbelt and was helped to the side of the road. The impact from that collision proximately caused the deaths of John Walker and Michael Murray and injuries to Alan Vandermyden, all occupants of the other vehicle.

At the scene, the paramedic attending to Mr. Larson did not notice an odor of alcohol. Others noticed some odor of alcohol. However, Mr. Larson was coherent.

At about 6:30 p.m. Officer Shelby of the California Highway Patrol came to the emergency room of the hospital and contacted Mr. Larson. The Officer observed that Mr. Larson had an odor of an alcoholic beverage on his breath, that

his eyes were glassy and that his speech was slow and thick. Unknown to Officer Shelby at the time, Mr. Larson had been given demerol at the hospital to relieve pain. The Doctor testified that demerol has a sedative effect and may have caused slower, thicker speech.

Nevertheless, as a result of the observations at the time, Officer Shelby arrested Mr. Larson.

On September 10, 1987, the District Attorney for the County of San Luis Obispo filed a felony complaint in the Grover City Municipal Court within the County of San Luis Obispo. A preliminary hearing was held and the case was eventually tried to a jury in late February and early March of 1988. The jury returned with guilty verdicts on two counts of vehicular manslaughter. However, they were unable to reach a

verdict on the third count of felony drunk driving. The jury was deadlocked nine (9) to three (3) in favor of acquittal on Count III. Nine (9) of the jurors found a reasonable doubt as to the proof of impairment but did not understand that impairment was also an element of the vehicular manslaughter charges.

A Motion for New Trial was filed April 5, 1988, and was eventually granted on June 10, 1988. A mistrial had already been declared as to Count III due to the deadlocked jury and a new trial was granted as to Counts I and II on the basis of the inconsistent verdicts and the fact that the jurors had relied upon the verdict forms rather than upon the jury instructions in order to determine the elements of the offenses.

In July of 1988, the case was

assigned for jury trial. The District Attorney and Defense Counsel announced ready for several days in succession at the Master Calendar call. However, on the first day set for trial, after discussing a number of preliminary matters with the Judge, the District Attorney announced his decision to dismiss and refile the case based on the fact that he had a vacation planned within two weeks. Appellant, through counsel, objected to the dismissal, however, the Court granted the District Attorney's Motion.

The case was then re-filed by the District Attorney's Office in the San Luis Obispo Municipal Court. A second preliminary hearing was held on the transcript of the prior hearing with additional testimony from one witness. Appellant was held to answer and an

Information was filed in the San Luis Obispo Superior Court on October 11, 1988.

The jury trial commenced on December 6, 1988. After lengthy deliberations the jury was deadlocked and on December 27, 1988, the Judge excused the jury declaring a mistrial.[1] Thereafter, the District Attorney announced he was prepared to try the case for a third time. Appellant made a Motion to Dismiss the action on the grounds that he was denied a speedy trial and his rights to due process under the State and Federal Constitutions and that Penal Code Section 1385 was not complied with. Said Motion to Dismiss was filed on January 9, 1989, and was thereafter heard and denied by the Honorable Judge Fredman.

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[1] Juror interviews disclosed that the jury was deadlocked eight (8) to four (4) for acquittal. (C.T. 56)

The case was assigned for a new trial in the Superior Court of San Luis Obispo County, State of California. This third trial commenced on February 27, 1989. After lengthy jury deliberations the jury was once again deadlocked on the charged offenses as well as lesser included. A mistrial was declared and the jury discharged.[2]

On March 31, 1989, Appellant again made a Motion to Dismiss the action on the grounds that he was denied a speedy trial and his rights to due process under the State and Federal Constitutions and on the further ground that Penal Code Section 1385 was not complied with. The motion was denied.

The case was set for a fourth jury

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[2] The Jury was apparently split seven (7) to five (5) one way or the other on the charges alleged in the Information.

trial on August 23, 1989. The jury found Appellant not guilty as to Counts I and II, vehicular manslaughter while intoxicated and not guilty as to Count III driving under the influence causing bodily injury. However, the Jury found Appellant guilty of two lesser included offenses of misdemeanor vehicular manslaughter.

## REASONS FOR GRANTING THE WRIT

I.

**The issue of whether trying a defendant a fourth time after three "hung jury" mistrials is a denial of due process under the Fifth and Fourteenth Amendments of the United States Constitution has not been addressed by this Court nor the courts of most states.**

This issue has not been addressed by this Honorable Court nor by the courts of most of the states, undoubtedly because in most cases, the state would dismiss the case after a second or certainly a third hung jury mistrial.

This Honorable Court has determined that one retrial after a hung jury is permissible in United States vs. Perez (1824) 22 U.S. 579 [6 L.Ed. 165], although this Court has also expressed its concern over the unfairness and

potential dangers of retrials. See Green vs. United States (1957) 355 U.S. 184 at 187-188 [2 L.Ed.2d 199, 78 S.Ct. 221]; Arizona vs. Washington (1978) 434 U.S. 497, at 504, [54 L.Ed.2d 717, 98 S.Ct. 824].

The Supreme Courts of three states have squarely addressed the issue and lower federal courts have grappled it.

The Tennessee Supreme Court in State vs. Witt (1978) 572 S.W.2d 913, upheld the dismissal for indictments for murder in the first degree after three hung jury mistrials stating that a fourth trial in that case, "Offends traditional notions of fair play and substantial justice".

The Supreme Court of Hawaii in State vs. Moriwake (1982) 65 Hawaii 47 [647 P.2d 705] upheld a dismissal after two hung jury mistrials on charges of manslaughter.

And finally, the Supreme Court of New Jersey in State vs. Abbati (1985) 99 N.J. 418 [493 A.2d 513] affirmed the authority of the Court (although reversing and remanding for further hearing) to dismiss charges of first degree kidnapping, first degree aggravated sexual assault and other charges after two hung jury mistrials, resting its decision on fundamental fairness as an integral part of the right of due process under the Federal Constitution.

Lower federal courts have also grappled with but have not decided the issue. See e.g., Preston vs. Blackledge (E.D.N.C. 1971) 332 F.Supp. 681; United States vs. Ingram (1976) 412 F.Supp. 384.

## II.

**More than two trials violates the federal constitutional guarantees of due process and fundamental fairness unless there are extraordinary circumstances.**

The concept of "fundamental fairness" is an integral part of the right to due process Ake vs. Oklahoma (1985) 470 U.S. 68 [84 L.Ed.2d 53, 105 S.Ct. 1087].

The Supreme Court of New Jersey specifically recognized that the number of retrials is a matter of "fundamental fairness" which is required by the United States Constitution and the courts of its own state. State vs. Abbati (1985) 99 N.J. 418 [493 A.2d 513]. In discussing the trial court's duty to determine whether or not a third trial should be allowed after two hung juries on first degree kidnapping, first degree

sexual assault and other charges, the Court said:

> "That discretion in the final analysis must be informed and guided by considerations of fundamental fairness, as well as the judiciary's responsibility for the proper overall administration of the criminal justice system." Id.[3]

We respectfully submit that it would be appropriate to follow the rule

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[3]The New Jersey Supreme Court in Abbati cited the following U.S. Supreme Court decisions for the proposition that fundamental fairness is required under the due process clause of the Fourteenth Amendment:
Ake vs. Oklahoma (1985) 470 U.S. 68 [84 L.Ed.2d 53, 105 S.Ct. 1087;
Moran vs. Ohio (1984) 469 U.S. 948 [83 L.Ed.2d 285, 105 S.Ct. 350] (Mem.);
California vs. Trombetta (1984) 467 U.S. 479 [81 L.Ed.2d 413, 104 S.Ct. 2528].
The Court also found that fundamental fairness may "Be considered a penumbral right reasonably extrapolated from other specific Constitutional guarantees." The Court cited:
Barker vs. Wingo (1972) 407 U.S. 514 [33 L.Ed.2d 101, 92 S.Ct. 2182];
United States vs. Agurs (1976) 427 U.S. 97 [49 L.Ed.2d 342, 96 S.Ct. 2392];
Bearden vs. Georgia (1983) 461 U.S. 660 [76 L.Ed.2d 221, 103 S.Ct. 2064].

specifically set forth by the Hawaii Supreme Court in State vs. Moriwake (1982) 65 Hawaii 47 [647 P.2d 705] that:

> ". . . in most cases, serious consideration be given to dismissing an indictment with prejudice after a second hung jury mistrial."

In other words, unless there are extraordinary circumstances, the State should be given two and only two opportunities to convict a Defendant based on a hung jury mistrial. Therefore, this case should have been dismissed with prejudice both as a part of the inherent power of the Court and as a matter of due process under the State and Federal Constitutions.

III.

This Court should set forth the criteria to be used to evaluate the appropriateness of any more than two

trials.

This Court should set forth specific criteria that can be fairly applied in the state courts to ascertain whether or not a case is the type of extraordinary case that should have gone to a third, let alone a fourth jury trial.

The following factors have been set forth in all the decisions which have spoken to the issue.

(1) the reasons for the prosecutor's decision to reprosecute, including the gravity of the criminal charges and the public's concern for effective and definitive conclusion of criminal prosecutions;

(2) The circumstances of the individual defendant and the impact of a retrial on the defendant in terms of untoward hardship and unfairness;

(3) The number of prior mistrials and the outcome of the juries' deliberations, if known;

(4) The character of the prior trials including length, complexity and similarity of evidence;

(5) The likelihood of any substantial difference in a subsequent trial, if allowed;

(6) The trial court's own evaluation of the relative strength of each parties' case;

(7) The professional conduct and diligence of counsel, particularly that of the prosecutor;

(8) Whether or not the search for truth is impeded by another trial;

(9) The effects on the courts, witnesses and jurors.

Factors "3" through "7" are almost verbatim renditions of the first

five factors adopted by the New Jersey Supreme Court in State vs. Abbati, supra, which in turn were taken almost verbatim from Items 6 through 6 of the Hawaii decision in State of Hawaii vs. Moriwake, supra.

Factor "1" is the factor of the same number in the Hawaii decision and is spelled out in more detail by the New Jersey Supreme Court immediately following their enumeration of the other factors.

Factor "2" follows that discussion in the New Jersey decision and is found in the prefatory remark of the Hawaii Court prior to its enumeration.

Factors "8" and "9" are taken from the discussion of the Federal Court in United States vs. Ingram, supra.

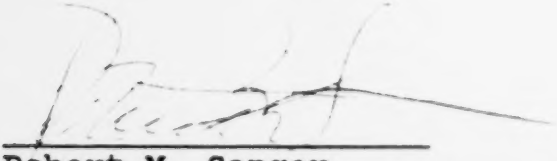
The concept behind the factors listed is to set forth some specific

criteria that can be fairly applied by the courts to ascertain whether or not this case was the type of extraordinary case that should have gone to a third, let alone a fourth, jury trial.

## CONCLUSION

For the reasons stated above, this petition for certiorari should be granted. If the petitioner is correct in urging that allowing a fourth trial after three "hung jury" mistrials is a violation of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution, the judgment below should be reversed.

DATED: November 11, 1991



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